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rate of Rs. 2 for each day that elapsed since the original conviction. At the second trial he wished to challenge the correctness of the first conviction by showing that the Board's notice was illegal and so forth. The Magistrate refused to allow this to be done, and in my opinion the view taken by the Magistrate is correct. Before the institution of the second prosecution the applicant challenged the correctness of the first conviction by means of applications to the District Magistrate and to this Court, but his applications were thrown out. It seems to me impossible to hold that after a conviction under section 147 the person convicted may challenge the correctness of that conviction as often as he is prosecuted for continued disobedience of the order of the Board. The correctness of the first conviction cannot now be challenged.

This application for revision is dismissed.

Application dismissed.

APPELLATE CIVIL.

1914
March, 20.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

ALI HUSAIN AND OTHERS (DEFENDANTS) *v.* FAZAL HUSAIN KHAN (PLAINTIFF.)*

Muhammadan law—Shia school—Waqf—Marz-ul-maut—Validity of waqf made in marz-ul-maut.

Under the Shia law a waqf made in death-illness is valid only to the extent of one third if not assented to by the heirs, even if possession has been delivered by the maker of the waqf. *Nazar Husain* v. *Rafeeq Husain* (1) approved.

THE facts of this case were as follows:—

One Gazanfar Husain died on the 13th of May, 1907, having, two days before his death, namely, on the 11th of May, made a waqf of certain property and placed the trustees in possession The present suit was brought by Fazal Husain Khan, who claimed to be the heir of Gazanfar Husain, and also of one Azima Bibi, aunt of Gazanfar Husain, to whom it was alleged that part of the waqf property belonged, and he claimed possession upon the ground that the waqf was invalid according to the Muhammadan law applicable to the Shia sect, to which the deceased belonged.

* First Appeal No. 308 of 1911, from a decree of J. H. Cuming, District Judge of Jaunpur, dated the 23rd of May 1911.

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The court of first instance found that Gazanfar Husain was suffering from death-illness when he made the waqf; but that he was in full possession of his senses, and that he made over possession to the *mutawallis*. On these findings it held that the waqf was valid to the extent of one third only and gave the plaintiff a decree, but for some what less than his claim. The defendants appealed to the High Court and the plaintiff also filed objections as to so much of the claim as had been dismissed.

The Hon'ble Dr. *Sundar Lal*, for the appellant.

Dr. *S. M. Suleman* (with Mr. *B. O'Conor*) for the respondent.

RICHARDS, C.J., and BANERJI, J.—The suit which has given rise to this appeal was brought by the plaintiff respondent for possession of property the bulk of which belonged to one Gazanfar Husain. The remainder of the property is alleged to have belonged to Azima Bibi, sister of t e plaintiff and aunt of Gazanfar Husain. The plaintiff claims as heir to both these persons.

Gazanfar Husain died on the 13th of May, 1907, but two days before his death, that is, on the 11th of May, 1907, he executed a deed of waqf in respect of the whole of the disputed property under which the appellants were appointed trustees of the waqf. The validity of the waqf is disputed by the plaintiff on various grounds, the principal grounds being that the donor was suffering from death-illness, (*marz-ul-maut*); that he had no mental capacity to make the waqf, and that possession was not delivered under it. The court below has found that Gazanfar Husain was suffering from death-illness of which he died, that he was in the full possession of his senses when he made the waqf and that he delivered possession of the property to the *mutawallis*. On these findings the learned Judge has held the waqf to be valid only as regards a one third share by reason of *marz-ul-maut* (death-illness) and has granted a decree to the plaintiff for a part only of the property claimed. The defendants have preferred this appeal, and the plaintiff has filed objections under order XLI, rule 22, of the Code of Civil Procedure, as regards the portion of the claim dismissed.

Accepting the findings of fact of the court below, the appellants contend that as possession was delivered the waqf is valid in

respect of the entire property, under the Shia law. It is admitted that Gazanfar Husain belonged to the *Asna Asharya* or Imamia sect of Shias. It is stated, however, that he was an *Asuli* and followed the tenets of that school among Imamias, but this is denied by the plaintiff. Holding the view that we do, we deem it unnecessary to determine whether he was an *Asuli* or an *Akhbari*.

It is common ground that among Sunnis, who comprise the great majority of the Musalmans of India, a gift or waqf made in mortal illness (*marz-ul-maut*), unless assented to by the heirs, is valid only to the extent of one third. It is urged, however, that a different rule prevails among Shias. If this is so, we should apply in the case of Shias, the law of that sect under the rule of justice, equity and good conscience which we are bound to administer. [See the ruling of their Lordships of the Privy Council in *Rajah Deedar Hossein* v. *Ranee Zuhoor-oon Nissa* (1)]. We have, therefore, to determine whether under the Shia law a waqf made in death-illness is valid as regards the entire property if possession has been delivered under it.

The case has been argued with great ability on both sides and various original texts of writers on Shia law have been cited. Many of these works have not yet been translated into English and we have been supplied with translations by the learned counsel of the parties. The opinions of these writers, as is usual in such cases, are conflicting, and we have to ascertain as best we can what has been regarded as the law on the subject hitherto among Shias in this country.

We shall first consider the opinions of English text writers on the subject.

In Baillie's Digest of Muhammadan Law, Imamia Sect, in the chapter on waqfs, the learned author says, at p. 212:—"The contract is not rendered obligatory except by giving possession; but when so completed it cannot be revoked if made in health, and even when made in death-illness it is equally valid if allowed by the heirs, though if disallowed by them, it is valid only to a third of the deceased's estate, in the same way as a gift or a *muhabat* in sale. Some of our doctors insist that it should be sustained out

(1) (1841) 2 Moo. I. A., 441.

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of the whole of the estate; but the first opinion is the more approved. If one in death-illness should make a waqf, a gift, a *muhabat* sale, and also emancipate a slave and neither of the acts is allowed by his heirs, all are valid if they can be carried into effect out of a third of his estate". The above remarks are based on the Sharaya-ul-Islam which was printed in India so far back as 1839.

In the Tagore Law Lectures for 1874 by Shama Charan Sircar, the rule on the subject is thus laid down (p. 864):— "Made in death-illness, a waqf or appropriation becomes valid (to the full extent) if allowed by the heirs; otherwise only to the extent of a third (of his property) in the same way as a gift or *muhabat* in sale". The learned author had before him and consulted almost all the works of authority on Shia law, including the works on which the appellants rely (see p. 169 *et seq*), and he also referred, as he states in his preface, to the Mujtahid ("law doctor") of Lucknow. So that it cannot be said that he deduced the above rule without consulting all the authorities on the subject.

The latest writer on the subject is the Right Hon'ble Mr. Ameer Ali. In the first volume of his well known work on Muhammadan Law he states the Shia law as to waqf made in death-illness in the following terms on p. 531 (4th edition.):— "If a waqf be constituted at a time when the *wâqif* is suffering from a death-illness, and there is a clear indication of an intention on his part to transfer possession, it will take effect with reference to the entirety of the dedication, provided the heirs consent either before or after the death of the *wâqif*, otherwise the waqf will operate only in respect of one third of the estate of the testator. For a waqf is like other acts which take effect immediately, such as *hiba*, sale and similar obligations. If the waqf property is covered by one third of the estate, then it is valid as regards the entirety of the dedication. If not, each provision will be given effect to with regard to its priority until one third of the estate is exhausted." This learned author also has referred in the introduction to his book to the various Shia jurists on whose authority his conclusions are founded, and among them he enumerates the works of Abu Jafar at-Tusi, to which we shall

refer hereafter and on which much of the argument on behalf of the appellants is based.

The result of the above authorities is that among Shias a waqf made in death-illness is valid only to the extent of one third of the estate of the maker of the waqf, unless assented to by his heirs, even where the waqf is of immediate operation.

The above view is in consonance with the opinion of a large number of later writers on Shia law, the principal among whom is Shaikh Najm-ud-din Abdul Kasim Jafar, the author of the Sharaya-ul-Islam. As has been stated above, this work was published in India so far back as 1839 and portions of it have been translated by Mr. Baillie. According to Mr. Shama Charan Sircar it is "a work of the highest authority, at least in India, and is more universally referred to than any other Shia law book and is the chief authority for the law of the Shias in India" (Tagore Law Lectures, 1874, p. 171). Its great influence among Shias is referred to by Mr. Ameer Ali, though he considers the influence to be "baleful." Mr. Justice Mahmood in his judgements in *Abbas Ali* v. *Maya Ram* (1) and *Agha Ali Khan* v. *Altaf Hasan Khan* (2) described this work as one "of the greatest authority among Shias" and as being "the most authoritative text-book of the Shia law." Their Lordships of the Privy Council in the case of *Baqar Ali Khan* v. *Anjuman Ara Begam* (3) regarded the Sharaya-ul-Islam as "the most authoritative work" of the Shia school. In this work the rule is thus stated :—"If a man were to make waqf and die without giving possession the waqf would be void; but if a waqf be made in death-bed and possession be given, then it will take effect to the extent of a third if the heirs do not consent. Without possession the waqf fails whether made in health or illness. It (the waqf) does not become binding except by delivery of possession, and when completed (by delivery of possession) it cannot be revoked if made in health, but if made during illness and allowed by heirs it is operative in full, otherwise it is valid as regards a third." (Ameer Ali, p. 499, note.)

(1) (1888) I. L. R., 12 All., 229. (2) (1892) I. L. R., 14 All., 429.

(3) (1902) I. L. R., 25 All., 236 (255).

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The same view is held by the authors of Jawahir-ul-Kalam, Musalik-ul-Afham, Jamaa-ul-Muqasid, Mukhtasar Shara-i-Lama and other works regarded as authoritative among Shias. They refer to the existence of a contrary opinion among some of the earlier writers, but they consider the view adopted by them as the better and more approved view.

On the other hand we find that some other writers have held a different opinion. Of these the principal authority, relied upon by the appellants, is that of Abu Jafar at-Tusi the author of Khalaf-us-Shaikh, the Nihaya, the Istibsar, the Tahzib-ul Ahkam and the Mabsut. The last of these, the Mabsut, is referred to by Mr. Ameer Ali as a work of great authority. The appellants have also referred to the Muqnia by Mufid, the Intisar by Murtaza, the Ghunia by Ibn Zuhra, the Al-Sarair by Ibn Idris, the Burhan-i-Qata, and the Jamaa-us-Shattat, a collection of traditions published in Persia in the last century. Other authors of less note have also been referred to. Translations of extracts from all these authors have been placed before us and their correctness is generally admitted. In the Khalaf-us-Shaikh the author, Abu Jafar at-Tusi, states as follows :—

"The lawyers are unanimous that a disposition by a sick person exceeding one-third of his property is invalid, if this disposition is not to have immediate operation (*ghair munnazziz*). If the act is to have immediate operation (*musrajjizat*) such as, for example, a manumission, gift and *muhabat*, there are among us two opinions, one of which is that it is valid and the other that it is invalid. The latter is the view of Shafai and all the Jurists (Sunnis.) They do not mention any difference of opinion. Our arguments for the first opinion are the traditions prevalent according to the narration of our *ulamas* which we have mentioned in our book (the Tahzib)." A similar statement is contained in the Nihaya, and the Istibsar. In the Tahzib-ul-Ahkam the tradition referred to is that of Abu Abdullah, who said that "a dying man has the best right to his property so long as there is life in him." This tradition is derived from Amar and Samaah, both of whom are, according to the author of Jamaa-ul-Muqasid, unreliable. In Tusi's great work the Mabsut he refers to the existence of two conflicting opinions among Shia jurists and apparently states the approved

rule to be that the disposition takes effect as regards one third only. He does not give preference to one opinion over the other. The names of the authors holding conflicting views on the points are enumerated in the Burhan-i-Qata. It is clear, however, that later writers whose works are regarded as of the highest authority and have hitherto been followed in India, are of opinion that a waqf made in death-illness is valid only to the extent of one third. In this conflict of opinions we see no reason to disregard what has till now been regarded as of paramount authority and follow texts (some of them obscure) which were practically unknown among Shias in this country. The danger of adopting the latter course was pointed out by their Lordships of the Privy Council in *Baqar Ali Khan* v. *Anjuman Ara Begam* (1), to which we have already referred. At p. 254 of the report their Lordships say:—"Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative." It is not easy to reconcile conflicting opinions on a question like this. No doubt as a general proposition a man is the owner of his property as long as he lives and may dispose of it in any manner he likes. But the Muhammadan law is jealous of acts which interfere with the expectations of heirs and is always anxious to maintain their rights. It is this jealousy which seems to be at the root of the rule that a will can only take effect as to one third, unless assented to by heirs. Apparently on the same principle, in the case of a disposition in death-illness (*marz-ul-maut*) without the consent of heirs, the disposition is held to be valid as regards one third only, as in the case of a will. As a donor suffering from death-illness has only a short time to live, his disposition can come into actual operation only after his death and is for all practical purposes a will. The contention of the learned counsel for the respondent to this effect seems to us to have much force.

In regard to the plea of the appellants that Gazanfar Husain was an *Asuli* and therefore the waqf made by him should be governed by the views of Shaikh Tusi and the author of the Intisar, which, according to Mr. Ameer Ali, are in force among

(1) (1912) I. L. R., 25 All., 236.

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Asulis, we may observe in the first place that no issue was raised in the court below as to whether he was an *Asuli* or an *Akhbari*. In the next place he himself made no distinction between these schools in the deed of waqf. According to the terms of that document the benefit of the waqf was to be enjoyed by all *Asna Asharayas*, irrespective of the school to which they belonged. Furthermore we may observe that in spite of the views of Shaikh Tusi and the other writers whose opinions coincided with his, Mr. Ameer Ali himself laid down the rule about the validity of waqfs made in death-illness which we have quoted above and made no distinction between *Asulis* and *Akhbaris*. We are therefore unable to accede to the argument put forward on behalf of the appellants in this respect.

In our opinion the weight of authority is in favour of the view that under the Shia law a waqf made in death-illness is valid only to the extent of one third, if not assented to by the heirs, even if possession has been delivered by the maker of the waqf. A similar view was held by Mr. Justice PIGGOTT in the case of a gift in *Nazar Husain* v. *Rafeeq Husain*(1). The decision of the court below on this point is, in our judgement, correct. The other pleas taken in the memorandum were not and in our opinion could not be seriously pressed. The appeal must, therefore, fail.

[Their Lordships dealt with the objections of the respondent and proceeded.]

The result is that we dismiss the appeal with costs. We allow the objection of the plaintiff to this extent that we vary the decree of the court below by granting the plaintiff a decree for an 8 anna $\frac{1}{3}$rd pie share of all the property claimed. In other respects we affirm the decree of the court below. The parties will pay and receive costs in both courts in proportion to failure and success. We direct that the defendants shall be entitled to be recouped out of the trust estate any costs which they may pay to the plaintiff under this decree.

Decree modified.

(1) (1911) 8 A. L. J., 1154.